

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 26

Reference No: IACDT 002/17

IN THE MATTER of a referral under s 48 of
the Immigration Advisers
Licensing Act 2007

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **GZ**
Complainant

AND **KE (LUKE) LU**
Adviser

**DECISION
(Sanctions)
Dated 6 May 2019**

REPRESENTATION:

Registrar: S Carr, counsel
Complainant: Self-represented
Adviser: Self-represented

INTRODUCTION

[1] The Tribunal upheld this complaint in a decision issued on 15 March 2019 in *GZ v Lu* [2019] NZIACDT 15. It found that Mr Lu had facilitated the conduct of unlicensed persons to provide immigration advice, in breach of the Code of Conduct 2014 (the Code).

BACKGROUND

[2] The narrative is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[3] Mr Ke (Luke) Lu is a licensed immigration adviser resident in Australia, where he is also an Australian licenced migration agent.

[4] Mr Lu became a director and shareholder of a New Zealand registered company, Headsun International Group Ltd (Headsun). The company was intended as a joint venture between Mr Lu and New Zealand based Ms L, whereby Mr Lu would refer to Headsun any of his Australian clients who wanted to study in New Zealand.

[5] In August 2015, the complainant, Ms GZ, approached Headsun for assistance so her son could attend school in New Zealand. The complainant and her family are based in China.

[6] In September 2015, the complainant entered into two written agreements with Headsun for services relating to a guardian visa for herself and a student visa for her son.

[7] Ms L signed on behalf of Headsun. The company, primarily an overseas education consultancy, described itself as available to provide advice on visa applications and to assist with the preparation of visa documents. It held itself out as handling all visa application procedures.

[8] Headsun procured the offer of a place from a New Zealand secondary school for the complainant's son.

[9] In September 2015, the complainant herself lodged visitor visa applications with Immigration New Zealand for both of them. She had obtained assistance from Headsun in preparing the applications. They duly arrived in New Zealand.

[10] The complainant then instructed Headsun to prepare guardian and student visa applications for them. Headsun did so and the applications were lodged by the complainant herself with Immigration New Zealand on 2 November 2015.

[11] Immigration New Zealand wrote to the complainant on 24 November 2015 outlining a number of concerns with her application. These related to her funds, the good character requirements and being a *bona fide* applicant.

[12] The complainant sought assistance from Headsun in replying. Ms L advised her that they were very experienced in handling such issues and that her business partner had 16 years' experience with visa applications. He was a licensed adviser for both New Zealand and Australia.

[13] A draft letter to Immigration New Zealand was prepared by Headsun and emailed to Mr Lu who returned the draft, having made some changes to it. It was finalised, then signed by the complainant and sent by her to Immigration New Zealand.

[14] Immigration New Zealand declined the visa applications.

Complaint

[15] The complainant filed a complaint against Mr Lu in December 2015 with the Immigration Advisers Authority (the Authority), headed by the Registrar of Immigration Advisers (the Registrar). The complainant was upset that her application had been declined by Immigration New Zealand and even worse that her son had been found to be of bad character.

[16] The Authority notified Mr Lu who replied through his then solicitor on 26 August and 12 September 2016. He explained that the intention was that Headsun would provide only education placement services and not immigration advisory services. The business venture had turned out to be unsuccessful as Mr Lu only ever referred one client to Headsun. Headsun then stopped paying Mr Lu, so he considered his involvement to be at an end. He never played any role in the management of Headsun, nor did he ever provide any services to the company or its clients, aside from the complainant.

[17] In relation to the complainant, Headsun had been engaged to provide services relating to her and her son coming to New Zealand, but not visa or immigration advice. The client agreements had not reflected the intention of the parties. Mr Lu had no involvement beyond checking the complainant's proposed letter and making minor grammatical suggestions. He had not considered that Headsun might be straying into

providing immigration advice to the complainant. The assistance Mr Lu had provided was unpaid and in the context of helping a friend.

[18] Mr Lu acknowledged that Headsun employees might have strayed into providing immigration advice. The mistakes were isolated and were not part of the wider provision of immigration advice to clients. Mr Lu had since proactively engaged in the dispute and ensured that the complaint was resolved and that any mistakes by Headsun's employees were not repeated. He also intended to remove himself as a director and shareholder of Headsun.

Decision of Tribunal

[19] In its decision of 15 March 2019, the Tribunal upheld the complaint and found that Mr Lu had breached cls 1 and 3(c) of the Code, in that he had allowed unlicensed individuals to provide services only a licensed immigration adviser could provide.

[20] It found that Mr Lu had engaged in what is known in the immigration advisory profession as "rubber stamping". Essentially, this occurs when an adviser permits unlicensed people, usually in a different country, to engage with the client and prepare the documentation, with the adviser usually having no or little relationship with the client. It is a serious breach of both the Immigration Advisers Licensing Act 2007 (the Act) and the Code to permit unlicensed individuals to give immigration advice. The Tribunal accepted, however, that Mr Lu's violation was at the lower end of the spectrum. It was recognised that it was an isolated incident, which had occurred only once. Mr Lu had not received any payment.

[21] It was acknowledged that Mr Lu, to his credit, had been proactive since the complaint was made in resolving the dispute with the complainant and ensuring that Headsun's staff were aware of the statutory requirements.

SUBMISSIONS

[22] Counsel for the Registrar, Ms Carr, submits that Mr Lu should be:

- (1) cautioned or censured; and
- (2) prevented from reapplying for a licence unless he completes the full Graduate Diploma in New Zealand Immigration Advice offered by Toi-Ohomai Institute of Technology.

[23] Mr Lu accepts that he should be cautioned or censured and that he should undertake further training, but he wants to be allowed to undertake the online training provided by the Authority as he lives in Australia. He says he now appreciates that if he allows his licence to be displayed, he must supervise the staff. He failed to do so in this case. Mr Lu says he will make sure it never happens again.

[24] Mr Lu advises that he has already taken a short course in New Zealand immigration law at a university in Australia. He now understands that the professional codes of New Zealand and Australia are different. This is why he actively cooperated with the relevant parties to resolve the complaint and ensure the staff were aware of the statutory requirements.

[25] According to Mr Lu, he has practiced for 10 years in Australia without a complaint as he complies with the professional code there. He has now learned his lesson and will not undertake work in New Zealand unless he fully understands the New Zealand Code.

JURISDICTION

[26] The Tribunal's jurisdiction to award sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:¹

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[27] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
 - (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:

¹ Immigration Advisers Licensing Act 2007.

- (d) cancellation of licence:
- (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[28] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[29] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:²

It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

[30] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.³

[31] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁴

[32] The most appropriate penalty is that which:⁵

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

DISCUSSION

[33] While permitting unlicensed persons to provide immigration advice is a serious breach of the Act and the Code, I have already made the point that this was an isolated incident on the part of Mr Lu at the lower end of the scale. Mr Lu did not set up a business structure in order to circumvent the requirements of the Act, as other advisers who have engaged in rubber stamping have done. In seeking to assist Ms L of Headsun, he overlooked his legal and professional obligations.

³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee* at [151].

⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁵ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], relying on *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [49].

[34] I agree with both Ms Carr and Mr Lu that the only potentially relevant sanctions are caution or censure, as well as training.

[35] Given the one-off nature of the conduct, I propose to caution Mr Lu rather than to formally censure him. Any repeat of such conduct would attract a heavier sanction.

[36] There is no doubt Mr Lu needs training in the requirements of professional conduct in New Zealand, as he acknowledges. Given his responsible approach to resolving the dispute as soon as it arose, his education of Headsun's staff in the limits of their duties and his acceptance of wrongdoing, I do not need to make any order preventing Mr Lu from reapplying for a licence, whether with or without a training condition attached.

[37] Nor do I see the need for him to undertake the full Graduate Diploma in New Zealand Immigration Advice. The breach was a one-off and there is no evidence of any broader concerns with his ethics or competence. So far as is known, his conduct in Australia over 10 years of practice has been good.

[38] However, it seems to me he needs more than just the online training offered by the Authority, which is in any event mandatory for him. Immigration advisers who are based in Australia and are licensed migration agents there are also bound by the CPD requirements of the Authority.

[39] I propose to impose additional training on Mr Lu, though I accept he should not be required to physically come to New Zealand to undertake it. Mr Lu will therefore be ordered to undertake the refresher course offered by Toi-Ohomai, which is available online.

OUTCOME

[40] Mr Lu is:

- (1) cautioned; and
- (2) ordered to enrol and complete the New Zealand Immigration Advice Refresher Course offered by Toi-Ohomai Institute of Technology at its next intake.